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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 571

GARY JAMES SYLVIA, *Petitioner*

v.

THE STATE OF FLORIDA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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No.

GARY JAMES SYLVIA, *Petitioner*

v.

THE STATE OF FLORIDA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

Petitioner prays that a writ of certiorari issue to review the opinion of the District Court of Appeal of Florida, Third District filed May 7, 1968, and the Order Denying Rehearing filed May 29, 1968.

OPINIONS BELOW

The Judgment of the Criminal Court of Record in and for Dade County, Florida, was filed and entered on May 4, 1967. (App. D) It is recorded in Criminal Court of Record Minute Book No. 243 at Page 354.

The Opinion of the District Court of Appeal of Florida, Third District, was filed May 7, 1968. (App. H) It is recorded in Minute Book 26 at Page 106. Rehearing was denied on May 29, 1968. Denial of rehearing is recorded at Minute Book 26, page 214. (App. J) The opinion of the District Court of Appeal of Florida, Third District, is reported at 210 So.2d 286 (Fla App. 1968).

JURISDICTION

The decision of the District Court of Appeal of Florida, Third District, entered on May 7, 1968, became final upon denial of Petition for Rehearing on May 29, 1968. Mr. Justice Black extended the time for filing Petition for Writ of Certiorari to and including September 26, 1968). (App. K)

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3) because a title, right, privilege or immunity claimed under the Constitution or Statutes of the United States, was denied by the District Court of Appeal of Florida, Third District. Jurisdiction is also invoked under Rule 19(1)(a) of the Rules of the Supreme Court of the United States, adopted June 12, 1967, effective October 2, 1967, because a State Court has decided a federal question of substance in a way probably not in accord with applicable decisions of this Court.

QUESTION PRESENTED

Does the Defense of Entrapment Relied Upon by One Defendant in a Joint Trial for Robbery Inculpate His Co-Defendant So as To Require Reversal under Bruton v. United States, When Motions for Severance Were Denied and Objection Was Made to the Introduction of the Entrapment Witnesses by His Co-Defendant?

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES—AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

CONSTITUTION OF THE UNITED STATES—AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TITLE 28 UNITED STATES CODE—SECTION 1257(3)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

RULES OF THE SUPREME COURT OF THE UNITED STATES RULE 19

(1)(a) Where a state court had decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

STATEMENT OF THE CASE

GARY JAMES SYLVIA and FRANK HIRAM BEAUCHAMP were jointly tried upon the charge of breaking and entering a dwelling house with intent to commit a robbery. (App. A) Defendant, SYLVIA, was charged as a principal in the first degree, with aiding, abetting and otherwise procuring Defendant, BEAUCHAMP, to break and enter the dwelling house with the intent to commit a robbery, by Defendant SYLVIA, waiting outside in a parked car for the purpose of assisting Defendant, BEAUCHAMP to escape. Defendant, SYLVIA, entered a plea of not guilty. A joint jury trial was held.

Defendant, SYLVIA, made numerous motions for severance before and during the trial, all of which were denied by the Court. He contended that he would be prejudiced by Defendant, BEAUCHAMP's reliance on the defense of entrapment, a defense which was antagonistic to his own defense. Defendant SYLVIA pre-

sented no evidence. He contended that Defendant BEAUCHAMP's reliance on the defense of entrapment, and testimony presented by Defendant BEAUCHAMP in support of that constituted an admission of the facts of the crime causing prejudice to Defendant, SYLVIA.

The evidence disclosed that Julius Deitch (an undercover agent for the Wackenhut Corporation) had discussed the robbery prior to the date of its commission. Deitch was introduced to Defendant SYLVIA at the home of Doreen Greer. Prior to that time Deitch had met with Defendant BEAUCHAMP. Defendant SYLVIA was present at a subsequent meeting between Deitch and BEAUCHAMP as well as on one occasion when the three men drove past the location of the dwelling house which was the subject of the crime charged. On each of the occasions when SYLVIA was present although BEAUCHAMP and Deitch discussed plans, SYLVIA did not participate in the discussion.

SYLVIA was present at a discussion in BEAUCHAMP's apartment when BEAUCHAMP laid out the plans of the house with toothpicks. SYLVIA asked Deitch if a piece was needed, referring to a gun, but no decision to use a gun was made. SYLVIA drove Deitch's car from a restaurant to a location near the house. BEAUCHAMP sat in back and Deitch sat in front.

No other testimony was presented as to Defendant SYLVIA.

Almost one-half the trial testimony concerned the activities of Defendant Beauchamp. According to testimony presented at the trial, Deitch and BEAU-

CHAMP went to the residence. SYLVIA remained behind, in the parked car a block away.

Testimony was admitted indicating that BEAUCHAMP and Deitch donned stocking masks, opened the screen door and the front door and heard the shout "Freeze, or you're dead", by police, who caused BEAUCHAMP to place his mask and unloaded gun on a chair and lie down on the floor. Several officers, armed with shotguns, and the family who resided at the house, had been waiting in the darkened house. Evidence, including wire, gloves, a bag, stockings and a gun was introduced over objection of counsel for Defendant SYLVIA at the trial.

Defendant SYLVIA was found guilty by the jury. The trial court denied numerous repeated motions for severance and mistrial. On several occasions the court cautioned the jury to limit the testimony to Defendant BEAUCHAMP. On several other occasions however, the court declined to give the requested instruction. Defendant BEAUCHAMP offered witnesses to testify in his behalf in order to prove his defense of entrapment.

BEAUCHAMP was sentenced to thirty years. Defendant SYLVIA was sentenced to imprisonment for eight years. He is presently incarcerated.

The trial court erroneously adjudicated Defendant SYLVIA convicted of "unlawfully and feloniously breaking and entering a dwelling house with intent to commit a felony; to-wit, grand larceny." The District Court of Appeal of Florida, Third District, reversed this portion of the trial court's adjudication so that it might conform with the charge of committing the felony of robbery.

HOW THE FEDERAL QUESTION WAS RAISED

Prior to trial, Motion for Severance on the ground that Defendant, SYLVIA would be unable to call Defendant BEAUCHAMP as a witness was made (T-27). The Motion was denied (T-28).

Motion for Severance was renewed (T-33) on the ground that discovery information afforded Defendant BEAUCHAMP was not presented to Defendant SYLVIA. The Motion was denied.

Antagonistic defense was the ground for the renewal of the Motion for Severance (T-38). It was denied.

At the trial Motions for Severance were made on numerous occasions. These Motions are too numerous to include here. The Court denied all Motions for Severance.

The Court relied on *Delli Paoli* v. *United States,* 352 U.S. 232, 1 L. Ed. 2d 278, 77 S. Ct. 294 in denying Motion for Severance (T-224) based on Defendant BEAUCHAMP's proposed calling of witnesses when Defendant SYLVIA would present no evidence. Transcript of Testimony, Page 226

> Mr. Grusmark: ". . . I can call Frank Beauchamp to the stand in another case. If this case were being tried one right after the other, I could call him tomorrow morning to the stand and when he doesn't testify, I can scream about it to the jury—and I can scream—but I could comment on it to the jury.
>
> Now, in this case I cannot call him to the stand. I cannot comment on it to the jury because a mistrial must result. That is the law.
>
> Now, in this case I cannot call him to the stand. I cannot comment on it to the jury because a mistrial must result. That is the law. . . .

I cannot be bound by the two witnesses that he produced. Here in fact the Court knows already that the positions are antagonistic. This has not created error. This is inherent in the very nature of this lawsuit.

Now it is true that many times you try a case and you get involved in the problem, you are away into the case and you try to cure it by instructions.

But not when you know in advance that it must take place, and here we know in advance that this must take place.

Transcript of Testimony, Page 228

The Court: "Would you recite again for me, and make it crystal clear, Mr. Grusmark, what your theory is as to why you must call Beauchamp as a defense witness on behalf of Sylvia?

What is the reason for that?

Mr. Grusmark: Because Beauchamp is going to testify that this is a deal that was all set up in advance, if there is such a deal between him and Deitch, and that this kid came along later and they said, "Get in the car and drive us away."

He had nothing to do with it. They had been talking about it as Deitch said since February 28th.

Deitch said, "I talked to him every day." Then he said, "I spoke to him again on March 5th."

Then he said the question of the gun—the question of the gun is important. Deitch says there were no guns in the car. The police say that the guns were first seen inside the house.

Deitch said Sylvia didn't know whether there was a gun. All of this evidence comes in inside the house, not in the car, not in the discussions with Sylvia at all.

I can prove this with him. I am entitled to prove it with him. I am not going to be tarred with these two witnesses. It just isn't right.

Transcript of Testimony, Page 332

Mr. Grusmark: "We object to any testimony after we have rested since we are entitled to have this case tried as if we were being tried alone, and our rights can be jeopardized by any further testimony concerning this situation.

The Court: Overruled.

This witness is being called on behalf of the defendant Frank Hiram Beauchamp."

Transcript of Testimony, Page 336

Mr. Grusmark: ". . . If it would create a more fair situation for everybody, we request the case go to the jury now on behalf of the defendant Sylvia."

Transcript of Testimony, Page 337

Mr. Grusmark: We have rested. If a severance had been granted we would be going to the jury now.

We feel honestly, and I know the Court by now is convinced that I am totally honest in my position, we feel honestly that these people must prejudice us and that he cannot get a fair trial after they take the stand and when they sit in the stand and are seen by the jury.

We ask that we be given the right to argue the case and have it go to the jury now with the right to argue a motion for new trial or a directed verdict at the end of all the testimony.

The Court: The request is denied."

Transcript of Testimony, Page 338

Mr. Grusmark: "If I ask questions can it be with the specific understanding that it is without waiving my objection to the appearance of the witnesses and without waiving my request for a

severance and for a separate consideration by the jury.

The Court: No.

Mr. Grusmark: I don't know what the "No" means. Is it without waiving that position?

The Court: You will have to take your chances in questioning the witness, Mr. Grusmark."

Motion for Severance was filed by counsel for Defendant SYLVIA (R-542) (Appendix B)

"1. That if the defendants herein were to be tried jointly, defendant, Gary James Sylvia, could be frustrated in his right to call the co-defendant as a witness because of the co-defendant's privilege against self-incrimination and if said co-defendant exercised such right, this defendant would be frustrated and embarrassed in his defense of this matter."

The Motion was denied (R-548).

The federal question was raised in the Motion for New Trial (R-566) (App. E)

"3. The Court erred in failing to grant a severance as to GARY JAMES SYLVIA in that the failure to grant said severance prejudiced his right to fair trial.

4. The Court erred under the requirements of *Jencks* v. *United States,* 353 U.S. 657, 1 L.Ed.2d 1103, in failing to require the State to produce statements of the prosecuting witness for the purpose of aiding counsel in cross-examining that witness.

6. The defendant, Gary James Sylvia's constitutional rights and protection were not fully protected in that comment was made on evidence to be produced and produced on behalf of the de-

fendant, Frank Hiram Beauchamp, which would necessarily raise a question in the minds of the jurors as to the failure of the defendant, Gary James Sylvia, to present testimony in his behalf. No instructions of the Court could erase any such query raised in the minds of any juror. See *Deluna* v. *United States*, 308 Fed 2d 140.

7. Defendant, Gary James Sylvia, if granted a severance and a new trial, would call to the stand the co-defendant, Frank Hiram Beauchamp, to establish the innocence of the defendant, Gary James Sylvia. Prior to the verdict of the jury and the sentence imposed by the Court the antagonism between the two defendants reflected repeatedly in the record, made it impossible for counsel for defendant, Gary James Sylvia, to secure information subsequently received, which could only come from testimony of the co-defendant, Frank Hiram Beauchamp. That testimony could not have been introduced at the trial of the defendants tried jointly under the restrictive constitutional requirements elucidated in DeLuna."

The Assignment of Errors raised the federal question (R-572) (Appendix G)

"7. That the Court erred in denying this defendant's motion for severance by its order dated April 17, 1967, in violation of defendant's constitutional rights pursuant to the applicable provisions of the Florida Constitution and the 6th and 14th Amendments to the United States Constitution.

8. That the Court erred in denying this defendant's motions for severance repeatedly renewed during the course of the trial in this cause in violations of this defendant's constitutional guarantees under the applicable provisions of the United States and Florida Constitutions.

13. That the Court erred in denying this defendant's motion to produce statements of Julius Deitch

made to the prosecuting authorities, said Julius Deitch being a police officer or agent, in violation of this defendant's constitutional guarantees under the United States Constitution."

The federal question was raised in the Brief and Reply Brief of Sylvia.

The District Court of Appeal, Third District, held that the trial judge did not abuse his discretion in refusing to grant the Motion for Severance, thus holding in effect that Defendant SYLVIA's constitutional rights had not been denied. (App. H)

Petition for Rehearing raised the federal question. (App. I) Petition for Rehearing was denied. (App. J)

REASONS FOR GRANTING THE WRIT

The defense of entrapment relied upon by Defendant Beauchamp in their joint trial for robbery inculpated Co-Defendant SYLVIA so as to require reversal under *Bruton* v. *United States* — S. Ct. —, 20 L. ed. 2d 476.

Numerous Motions for Severance were made before and during the trial by counsel for Defendant SYLVIA; all were denied. Although Defendants BEAUCHAMP and SYLVIA were charged in one information, the charge against Defendant SYLVIA delineated his activities to be sitting in a car for the purpose of aiding Defendant Beauchamp to escape. The robbery for which Defendant SYLVIA was charged as a principal, never took place, although the jury did find that a breaking and entering with intent to commit a felony occurred by Defendant BEAUCHAMP.

No escape took place. Thus, the only facts from which the jury could infer intent on the part of De-

fendant SYLVIA were facts relating to conversation had by Defendant BEAUCHAMP. Almost all of Defendant BEAUCHAMP's conversations relating to the crime were held out of the presence of Defendant SYLVIA, and thus were inadmissible against Defendant SYLVIA. They were admitted along with objects taken as evidence from Defendant BEAUCHAMP, over Defendant SYLVIA's objections.

The foregoing testimony and evidence pertaining to Defendant BEAUCHAMP constituted over half the trial proceedings. Defendant SYLVIA contends that the exclusion of this prejudicial matter in a separate trial would have prevented the State from obtaining a verdict of guilty against him, since the record indicates that there was not sufficient competent evidence to convict Defendant SYLVIA.

In addition to the hearsay evidence offered by the State, prejudicial testimony was offered by Co-Defendant BEAUCHAMP.

Extra-judicial statements of a co-conspirator to be admissible against others must be made in furtherance of the conspiracy charged, if made in their absence. *Krulewitch* v. *United States* (1949) 336 U.S. 440, 93 L. ed. 790, 69 Sup. Ct. 716; *Delli Paoli* v. *United States,* (1957) 352 U.S. 232 1 L. ed. 2d 278, 77 Sup. Ct. 294. This principle is a recognized exception to the hearsay rule.

If the declaration is made in the presence of the co-conspirator, during the pendency of the conspiracy its admissibility is acceptable, for a logical reason. The inference that the defendant who did not make the declaration would naturally have contradicted it if he did not assent to its truth applies. See *Spars* v. *United*

States, (1895) 156 U.S. 51, 39 L. ed. 343, 15 Sup. Ct. 273.

Naturally a statement by a co-defendant, made *in* court, is not subject to the same inference since a defendant has a right not to testify under the Constitution of the United States. This right was exercised by defendant SYLVIA, who presented no testimony. Furthermore, the Defendant is not allowed the right of confrontation when the statement is made in Court, since he cannot compel his co-defendant to take the stand. Defendant BEAUCHAMP's defense of entrapment constituted an admission of the crime charged. *United States* v. *Kaiser,* 138 F.2d 219 (7th Cir. 1944), citing *Sorrells* v. *United States,* 287 U.S. 435, 445, 53 Supp. Ct. 210, 77 L. ed. 413, 86 ALR 249.

Because the defendants were factually joined in the information, which was read to the jury, Defendant SYLVIA could not escape the prejudice of his co-defendant's admission of the crime.

In addition Defendant SYLVIA was subjected to testimony from witnesses called by Defendant BEAUCHAMP on the issue of entrapment.

Defendant SYLVIA was denied the right to have his case presented to the jury at its conclusion, and before additional prejudicial testimony and argument by counsel for Defendant BEAUCHAMP was offered.

Although the Court instructed the jury that some of the testimony and evidence pertained only to Defendant BEAUCHAMP, on several occasions, it refused to repeat the instructions when requested to do so by counsel for Defendant SYLVIA on several other occasions.

In *Bruton* v. *United States*, —S. Ct. —, 20 L. ed. 2d 476, the Court held that the constitutional right of confrontation was denied by failure of a co-conspirator to take the stand regarding incriminatory extra-judicial statements, although the Court gave clear limiting instructions to the jury.

Petitioner respectfully submits that the defense of entrapment relied upon by Defendant BEAUCHAMP constituted an incriminating statement against Defendant SYLVIA, necessarily included within the prohibitions of *Bruton* because Defendant SYLVIA was denied constitutional rights. He was denied his right to confrontation because his co-defendant could not be called to the stand.

Defendant SYLVIA was placed under undue pressure to testify and forced to elect among his constitutional rights in order to remain silent. In view of the extremely limited case against him, the harm to Defendant SYLVIA in the eyes of the jury by his failure to testify or to cross examine his co-defendant constituted deprivation of his constitutional rights.

CONCLUSION

For the foregoing reasons it is respectfully submitted that Petition for Writ of Certiorari should be granted or in the alternative the decision of the District Court of Appeal of Florida, Third District should be reversed.

Respectfully submitted,

MILTON E. GRUSMARK
1674 Meridian Avenue
Miami Beach, Florida 33139
Attorney for Petitioner

APPENDIX A

(On March 16, 1967, the State of Florida filed its INFORMATION herein, in the Criminal Court of Record in and for Dade County, Florida, which said INFORMATION was duly docketed by the Clerk of the Court as Case No. 67-2207 of said Court and is in the words and figures following, to-wit:)

67-2207

IN THE CRIMINAL COURT OF RECORD, in and for Dade County, State of Florida, FEBRUARY Term, 1967.

Information for Breaking and Entering Dwelling

(Filed Mar 16 1967)
J. F. McCracken, Clerk C

THE STATE OF FLORIDA

v.

FRANK HIRAM BEAUCHAMP and GARY JAMES SYLVIA

IN THE NAME AND BY AUTHORITY OF THE STATE OF FLORIDA:

SEYMOUR GELBER, Assistant State Attorney of the Eleventh Judicial Circuit of Florida, prosecuting for the State of Florida, in the County of Dade, under oath, information makes that FRANK HIRAM BEAUCHAMP and GARY JAMES SYLVIA on the 12th day of March, 1967, in the County and State aforesaid, did unlawfully and feloniously break and enter a dwelling house located at 480 Northeast 180th Drive, City of North Miami Beach, Dade County, Florida, property of HAROLD and ELAINE SCHIFF, with intent to commit a felony therein, to-wit: ROBBERY, that is to say, the defendant, FRANK HIRAM BEAUCHAMP, being then armed with a dangerous weapon, broke and entered the premises as aforesaid with intent by force and violence or by putting in fear to rob, steal, take and carry away personal property from the person or custody of the said HAROLD and ELAINE SCHIFF against their will; and the defendant, GARY JAMES

SYLVIA, as a principal in the first degree, was then and there aiding, abetting and otherwise procuring the defendant, FRANK HIRAM BEAUCHAMP, the said felony to do and commit, by GARY JAMES SYLVIA waiting outside said premises in an automobile parked near the premises aforesaid and for the purpose of aiding, abetting and otherwise procuring the said FRANK HIRAM BEAUCHAMP to escape from the scene of the said crime, and to escape detection, arrest and punishment therefor, being in violation of 810.01 and 776.011 Florida Statutes,

MSH:alc
3/15/67
a Deft: Jail # 6917-67 Bkd: 3/12/67
b Deft: Jail # 6916-67 Bkd: 3/12/67

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contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida

/s/ SEYMOUR GELBER
Assistant State Attorney,
Eleventh Judicial Circuit of
Florida

STATE OF FLORIDA:
COUNTY OF DADE:

Personally appeared before me, SEYMOUR GELBER, Assistant State Attorney of the Eleventh Judicial Circuit of Florida, who, being first duly sworn, says that the allegations set forth in the within Information are based upon facts that have been sworn to as true, and which facts, if true, would constitute the offense therein charged.

/s/ SEYMOUR GELBER
Assistant State Attorney,
Eleventh Judicial Circuit of
Florida

Sworn to and subscribed before me this 15th day of March, 1967.

J. F. McCracken, Clerk
Criminal Court of Record,
Dade County, Florida

By: /s/ B. Kambas , D.C.

(Seal, Criminal Court of Record)

Defendants Frank Hiram Beauchamp and Gary James Sylvia arraigned in open Court on the within Information and pleaded .....

.....
Deputy Clerk, Criminal
Court of Record, Dade
County, Florida

Case No.

Criminal Court of Record
Dade County, Florida

The State of Florida

v.

Frank Hiram Beauchamp and Gary James Sylvia

Information for Breaking and Entering Dwelling

Witnesses for the State:

1. Harold Schiff
   480 N.E. 180th Dr.
2. Julius Deitch
   3280 Ponce DeLeon Blvd.
3. Lt. Charles Black,
4. Sgt. Robert Hoelscher,
5. Det. R.B. James,
6. Det. Frank Beirne,
7. Det. Adam Carter and
8. Det. Herbert Kuppersmith
   All of DPS

APPENDIX B

And on March 31, 1967, the Defendant filed herein his MOTION FOR SEVERANCE, which said MOTION is in the words and figures following, to-wit:

IN THE CRIMINAL COURT OF RECORD IN AND FOR DADE COUNTY, STATE OF FLORIDA,

FEBRUARY TERM, 1967

Case No. 67-2207-B

Motion for Severance

(Filed Mar 31 1967)
J. F. McCracken, Clerk K

THE STATE OF FLORIDA

v.

FRANK HIRAM BEAUCHAMP and GARY JAMES SYLVIA

COMES Now the defendant, GARY JAMES SYLVIA, by his undersigned attorney, and moves this Honorable Court for a severance of defendants and separate trials of the defendants herein, and as grounds therefor states as follows:

1. That if the defendants herein were to be tried jointly, defendant, Gary James Sylvia, could be frustrated in his right to call the co-defendant as a witness because of the co-defendant's privilege against self-incrimination and if said co-defendant exercised such right, this defendant would be frustrated and embarrassed in his defense of this matter.

2. That upon information and belief movant's co-defendant is a person previously convicted for felonies and is presently under information or indictment and that a joint trial with said co-defendant could seriously em-

barrass and hamper this defendant in presenting his defense to the crimes alleged.

3. That this defendant would be deprived of the right to select a jury of his own desire and liking in contravention of the constitutional rights afforded him in the State of Florida and United States Constitutions if he were subjected to objections by the co-defendant as to prospective jurors.

4. That because of the crimes alleged, this defendant would be extremely prejudiced if made to suffer a joint trial with the co-defendant herein.

/s/ LAWRENCE I. HOLLANDER
Lawrence I. Hollander
Attorney for Defendant,
Gary James Sylvia
407 Lincoln Road
Miami Beach, Florida

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Severance, was on this 31st day of March, 1967, mailed to Hon. Richard E. Gerstein, State's Attorney, 1351 N.W. 12th Street, Miami, Florida.

/s/ LAWRENCE I. HOLLANDER
Lawrence I. Hollander

APPENDIX C

IN THE CRIMINAL COURT OF RECORD, IN AND FOR DADE COUNTY, STATE OF FLORIDA

FEBRUARY TERM, 1967

Case No. 67-2207

Filed this 19 day of Apr. A. D. 1967 and recorded in Criminal Court of Record, Minutes No. 241 on Page 299-300

J. F. McCRACKEN, *Clerk*
By ILEEN L. JERVIS, Deputy

THE STATE OF FLORIDA

v.

FRANK HIRAM BEAUCHAMP and GARY JAMES SYLVIA

Order

(Filed Apr 19 1967)

THIS CAUSE having come on to be heard on the 13th day of April, 1967, upon defendant, GARY JAMES SYLVIA's motion for a bill of particulars, motion for severance and motion ore tenus to adopt the motion to suppress of the defendant, Frank Hiram Beauchamp, as and for the motion of the defendant, Gary James Sylvia, and the Court having heard argument of counsel for the respective parties hereto, and being otherwise advised in the premises, it is thereupon

ORDERED AND ADJUDGED as follows:

1. That defendant, GARY JAMES SYLVIA's motion for severance, be and the same is hereby denied.

2. That defendant, GARY JAMES SYLVIA's motion for a bill of particulars, be and the same is hereby:

(a) Granted as to paragraph numbered 1 thereof.

(b) Denied as to paragraph numbered 2 thereof.

(c) Granted as to paragraph numbered 3 thereof.

(d) Granted as to paragraph numbered 4 thereof.

(e) Granted as to paragraph 5 thereof with respect to any and all statements signed or unsigned, reduced to writing, and otherwise denied.

(f) Denied as to paragraph numbered 6 thereof.

(g) Denied as to paragraph numbered 7 thereof.

3. That the State of Florida shall furnish said defendant the information sought by said defendant in his motion for bill of particulars as to those items contained in said motion hereinbefore granted, within ten (10) days from the date hereof.

DONE AND ORDERED at Miami, Dade County, Florida, this 17th day of April, 1967.

/s/ EDWARD S. KLEIN
Judge, Criminal Court

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APPENDIX D

(And on May 6, 1967, the Court entered its JUDGMENT AND SENTENCE herein, which said JUDGMENT AND SENTENCE was duly filed and recorded on said date by the Clerk of the Court in Criminal Court of Record Minute Book No. 243, on Page 354, and is in the words and figures following, to-wit:)

BENCH DOCKET

Criminal Court of Record
Dade County, Florida

STATE OF FLORIDA

v.

GARY JAMES SYLVIA

Charge, Breaking and Entering Dwelling

Case No. 67-2207-B

Judgment

It appearing unto this Court that you, Gary James Sylvia, have been regularly tried and convicted of Unlawfully and feloniously breaking and entering a dwelling house located in Dade County, Florida, with the intent to commit a felony, to-wit: Grand Larceny

IT IS THEREFORE THE JUDGMENT of the law and it is hereby adjudged that you are and stand convicted of the offense as above set forth.

What have you to say why sentence should not now be imposed upon you?

Saying nothing that could influence the Court in its decision.

SENTENCE

IT IS FURTHER CONSIDERED, ORDERED AND ADJUDGED that you be imprisoned by confinement at hard labor in the STATE PENITENTIARY for a term of EIGHT (8) YEARS.

DONE AND ORDERED in open Court at Miami, Dade County, Florida, this 6 day of May A. D. 1967.

/s/ EDWARD S. KLEIN
Judge.

Filed this 6 day of May, A. D. 1967 and recorded in Criminal Court of Record, Minutes No. 243 on Page 354

J. F. McCracken, Clerk

By: DORIS MCVAY
Deputy Clerk

DIV. A.. B./.. C.. D..

Book 243—Page 354

APPENDIX E

(And on May 8, 1967, the Defendant filed herein his MOTION FOR NEW TRIAL, which said MOTION is in the words and figures following, to wit:)

IN THE CRIMINAL COURT OF RECORD, IN AND FOR DADE COUNTY, STATE OF FLORIDA

No. 67-2207 A and B

STATE OF FLORIDA, *Plaintiff*,

v.

FRANK HIRAM BEAUCHAMP and GARY JAMES SYLVIA
Defendants.

Motion for New Trial

(Filed May 8 1967)

Comes Now the Defendant, GARY JAMES SYLVIA, by and through his undersigned counsel, and files this Motion for New Trial, upon the following grounds:

1. The evidence does not support the verdict against the defendant, Gary James Sylvia.

2. The law of the case as applied to the evidence presented to the jury does not support the verdict against the defendant, GARY JAMES SYLVIA, and the judgment entered thereon.

3. The Court erred in failing to grant a severance as to GARY JAMES SYLVIA in that the failure to grant said severance prejudiced his right to fair trial.

4. The Court erred under the requirements of *Jencks* v. *United States*, 353 U.S. 657, 1 L.Ed.2d, 1103, in failing to require the State to produce statements of the prosecuting witness for the purpose of aiding counsel in cross-examining that witness.

5. The defendant, GARY JAMES SYLVIA, was denied his constitutional right to fair trial in that material evidence was discovered by counsel on Saturday morning, May 5, 1967, which could not have been discovered by reasonable diligence prior to that time. The evidence was material insofar as the credibility of the witness, Julie Deitch, the principal and only witness testifying materially in the case of State v. this defendant, Gary James Sylvia. The importance of the testimony presented to the Court by proffer is heightened by the fact that during his deliberations, the jury requested the rereading of the charge concerning entrapment. The evidence in question raised serious doubts as to the bonafides of the witness Julie Deitch.

6. The defendant, Gary James Sylvia's constitutional rights and protection were not fully protected in that comment was made on evidence to be produced and produced on behalf of the defendant, Frank Hiram Beauchamp, which would necessarily raise a question in the minds of the jurors as to the failure of the defendant, Gary James Sylvia, to present testimony in his behalf. No instructions of the Court could erase any such query raised in the minds of any juror. See *DeLuna* v. *United States,* 308 Fed.2d 140. Petition for rehearing denied, 324 Fed.2d 375.

7. Defendant, Gary James Sylvia, if granted a severance and a new trial, would call to the stand the co-defendant, Frank Hiram Beauchamp, to establish the innocence of the defendant, Gary James Sylvia. Prior to the verdict of the jury and the sentence imposed by the Court, the antagonism between the two defendants reflected repeatedly in the record, made it impossible for counsel for defendant, Gary James Sylvia, to secure information subsequently received, which could only come from testimony of the co-defendant, Frank Hiram Beauchamp. That testimony could not have been introduced at the trial of the defend-

ants tried jointly under the restrictive constitutional requirements elucidated in DeLuna.

8. For the foregoing reasons, defendant Gary James Sylvia, respectfully requests the consideration of this Court in granting a new trial to him without the inclusion of Frank Hiram Beauchamp as a co-defendant.

MILTON E. GRUSMARK and
LAWRENCE I. HOLLANDER
Attorneys for defendant, Gary James Sylvia
407 Lincoln Road
Miami Beach, Florida

By /s/ MILTON E. GRUSMARK
Milton E. Grusmark

I HEREBY CERTIFY that a true and correct copy of the Foregoing Motion for New Trial was on this 8th day of May, 1967, hand delivered to the Office of the Hon. Richard E. Gerstein, State Attorney, 1351 N.W. 12th Street, Miami, Florida.

By /s/ MILTON E. GRUSMARK
Milton E. Grusmark

APPENDIX F

(And on May 8, 1967, the Clerk of the Court entered in Criminal Court of Record Minute Book No. 243, on Pages 548 and 549, the following minutes, to-wit:)

DIVISION "B" May 8, 1967

No. 67-2207

THE STATE OF FLORIDA

v.

FRANK HIRAM BEAUCHAMP and GARY JAMES SYLVIA

Breaking and Entering Dwelling

Michael A. Masin, Assistant State Attorney.

Ronald J. Anderson, Counsel for the Defendant, Frank Hiram Beauchamp.

Milton E. Grusmark, Counsel for the Defendant, Gary James Sylvia.

Reported by: Elizabeth Driest.

Milton E. Grusmark, Counsel for the Defendant, Gary James Sylvia, presented a Motion for a New Trial, which motion the Court denied.

Milton E. Grusmark, Counsel for the Defendant, Gary James Sylvia, presented an Application for Bond.

The Court set Supersedeas Bond, as to the Defendant, Gary James Sylvia, in the amount of Seven Thousand Five Hundred ($7,500.00) Dollars, in the above styled cause.

Book 243—Page 548

APPENDIX G

IN THE CRIMINAL COURT OF RECORD, IN AND FOR DADE COUNTY, STATE OF FLORIDA

Case No. 67-2207 B

STATE OF FLORIDA, *Plaintiff*,

v.

FRANK HIRAM BEAUCHAMP and GARY JAMES SYLVIA
Defendants.

Assignment of Errors and Directions to the Clerk

The defendant, Gary James Sylvia, assigns as the errors on which he intends to rely in the District Court of Appeal, Third District of Florida, for reversal from the Order, Judgment and sentence appealed from, the following:

1. The verdict was contrary to the evidence.

2. The verdict was contrary to the law applicable.

3. The verdict was contrary to the law applicable and evidence.

4. The Court erred in failing to direct a verdict in favor of this defendant at the close of the prosecution's case, which motion for directed verdict was renewed at the conclusion of the defendant's case.

5. That the Court erred in failing to grant this defendant's motion for a directed verdict at the close of the defendant's case.

6. That the Court erred in denying this defendant's motion to quash the information by its order dated April 21, 1967.

7. That the Court erred in denying this defendant's motion for severance by its order dated April 17, 1967, in violation of defendant's constitutional rights pursuant to

the applicable provisions of the Florida Constitution and the 6th and 14th Amendments to the United States Constitution.

8. That the Court erred in denying this defendant's motions for severance repeatedly renewed during the course of the trial in this cause in violation of this defendant's constitutional guarantees under the applicable provisions of the United States and Florida Constitutions.

9. That the Court erred in its order of April 17, 1967, in denying paragraphs 2, 5, 6 and 7 of this defendant's motion for bill of particulars.

10. That the Court erred in denying this defendant a hearing on its motion to suppress prior to trial.

11. That the Court erred in denying this defendant's motion ore tenus on May 1, 1967, to dismiss the information herein for the failure of the prosecution to provide this defendant with a bill of particulars in accordance with the Court's order of April 17, 1967.

12. That the Court erred in denying this defendant's motion ore tenus on May 1, 1967, to continue the trial of this cause for the failure of the prosecution to provide this defendant with a bill of particulars in accordance with the Court's order of April 17, 1967.

13. That the Court erred in denying this defendant's motion to produce statements of Julius Deitch made to the prosecuting authorities, said Julius Deitch being a police officer or agent, in violation of this defendant's constitutional guarantees under the United States Constitution.

14. The Court erred in denying this defendant's renewed motion to inspect statements provided by the witness, Julius Deitch, to the prosecution.

15. That the Court erred in entering judgment of conviction against this defendant.

16. That the Court erred in denying defendant's motion for new trial by its order dated

17. That the Court erred in imposing sentence of this defendant.

18. That the Court erred in denying all of this defendant's requested jury instructions.

19. That the Court erred and abused its discretion in failing to permit this defendant to reopen the case after the close of all the testimony but before final argument upon proffer to the Court of newly discovered evidence.

20. That the Court erred in overruling this defendant's objections to improper statements of the Prosecutor in closing argument.

APPENDIX H

Not Final Until Time Expires To File Rehearing Petition and, If Filed, Disposed Of.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

January Term, A.D. 1968

Case No. 67-430

GARY JAMES SYLVIA, *Appellant,*

vs.

THE STATE OF FLORIDA, *Appellee.*

Case No. 67-531

FRANK HIRAM BEAUCHAMP, *Appellant,*

vs.

THE STATE OF FLORIDA, *Appellee.*

Opinion Filed May 7, 1968

Appeals from the Criminal Court of Record for Dade County, Edward S. Klein, Judge.

Milton E. Grusmark, Natalie Baskin; and Lawrence I. Hollander (for Sylvia); Engel & Pollack and Jack J. Taffer (for Beauchamp), appellants.

Earl Faircloth, Attorney General and Arden M. Siegendorf and Arthur L. Rothenberg, Assistant Attorneys General, for appellee.

Before Charles Carroll, C.J., and Barkdull and Swann, JJ.

Per Curiam.

Both of the above numbered appeals seek review of certain criminal proceedings wherein each of the appellants suffered an adverse jury verdict, judgment of conviction and sentence thereon. They have not been consolidated for appellate purposes, but were argued before court

on the same day and will be disposed of by this consolidated opinion.

The record on appeal reveals the following: On or about February 28, 1967, one Julius Deitch (an undercover agent for the Wackenhut Corp.) met the appellant Beauchamp. He was introduced by a so-called mutual friend as "Julie". Thereafter, Deitch let it be known to Beauchamp that he was just released from jail. He also passed on the information that his trade was that of an "iceman" and he was in desperate need of money. On March 5, 1967 Beauchamp took Deitch for a ride to 480 N.E. 180 Drive, North Miami Beach, where Beauchamp pointed out the home of one Schiff and informed Deitch that the lady who lived there had purchased some large diamonds from her father, a jewelry salesman. Beauchamp further stated that these diamonds could be fenced for approximately $1,000.00. Thereafter, Deitch and Beauchamp discussed the robbery on various occasions, mostly pertaining to the fencing of the jewelry. On March 8, 1967, Deitch met with Beauchamp, at which time the latter informed him he wanted the appellant, Sylvia, to accompany them on the job. Thereafter, Deitch met with Beauchamp at the apartment of one Doreen Greer, where he was introduced to Sylvia who Beauchamp said was a good man and that they had worked together in the past. No further conversation was held regarding the robbery until about 6:00 P.M. March 11, 1967, when Deitch, Beauchamp and Sylvia proceeded to the location of the robbery, at which time Beauchamp again pointed out the house and stated that it was the house they were going to hit and they discussed where the car would be parked. At about 8:00 P.M. that evening, Deitch met Beauchamp and Sylvia at the apartment of Doreen Greer and the three men and one Mr. Fabian went to Beauchamp's apartment, which was in the same building. Upon their arrival, Beauchamp proceeded to lay out the structure (or floor plan) of the house to be

robbed and they agreed among themselves that Beauchamp and Sylvia would enter the house and Deitch would drive the car. At about 10:00 P.M. that evening, Deitch called Beauchamp and they arranged to meet at the Dog House Restaurant at 163 Street and W. Dixie Highway at 2:00 A.M. on March 12, 1967. Beauchamp and Sylvia arrived at the restaurant at about 2:20 A.M. and Beauchamp informed Deitch that Sylvia would drive and that he and Deitch would enter the house. They proceeded to the scene of the robbery. While traveling, Beauchamp provided stockings for masks, gloves, and some wire in the event they needed to tie anyone up. Upon arriving at the scene, Sylvia remained in the car and Beauchamp and Deitch proceeded to the house. Beauchamp entered the house first, followed by Deitch. Immediately upon entering, they were accosted by sheriff's deputies who were lying in wait for them. Beauchamp was arrested and the gun he was carrying, along with the wire, gloves, and stocking mask were seized. Deitch slipped out the door and left the scene. Thereafter, one of the deputies proceeded to the parked vehicle and placed Sylvia under arrest. Beauchamp and Sylvia were each charged with breaking and entering a dwelling house with intent to commit a felony therein, to wit: robbery. They each pleaded not guilty to the charge and demanded a jury trial.

Of course, certain of this evidence was in conflict but, at this stage of the proceedings, all conflicts in the evidence and all reasonable inferences therefrom are in favor of the verdict. Crum v. State, Fla. App. 1965, 172 So. 2d 24; Mangel v. State, Fla. App. 1965, 179 So. 2d 888; Walden v. State, Fla. App. 1966, 191 So. 2d 68; Hennessy v. State, Fla. App. 1967, 198 So. 2d 37.

The first error complained of is that the trial court committed error in failing to grant a severance because of the antagonistic positions of the several defendants. This is a

discretionary matter with a trial judge. Suarez v. State, 95 Fla. 42, 115 So. 519; Hawkins v. State, Fla. 1967, 199 So. 2d 277. We fail to find an abuse of discretion on this record, although it might be better policy [when two defendants are charged and it is apparent, prior to trial, that one will put on no evidence and the other will rely on the defense of entrapment] that they not be tried together.

It is also urged that the trial court denied the appellants a fair trial by permitting the Information to be read to the jury; that it permitted comment by the prosecutor as to the guilt of the appellants and permitted a prosecution witness to connect himself with the Chief Executive of this State. It was no error to permit the Information to be read to the jury. Phillips v. State, 28 Fla. 77, 9 So. 826; Accord-Lamb v. State, 90 Fla. 844, 107 So. 530; Hall v. State, 119 Fla. 38, 160 So. 511; Roberts v. State, Fla. App. 1966, 188 So. 2d 392. The comment by the prosecutor was not prejudicial, requiring a new trial. Tyson v. State, 87 Fla. 392, 100 So. 254; Grant v. State, Fla. 1965, 171 So. 2d 361; §§ 54.23, 924.33, Fla. Stat. Neither was the connection between the witness and the Chief Executive prejudicial.

The appellant, Sylvia, also contends that the trial court erred in denying him a fair trial because the judgment rendered differs from the verdict. This matter will be referred to at the conclusion of this opinion.

Error is also urged in that the evidence was insufficient to sustain the verdict. The evidence, as outlined above, constitutes sufficient competent evidence to sustain the verdict and, therefore, with such in the record it is the duty of an appellate court not to disturb the verdict under review. Sharon v. State, Fla. App. 1963, 156 So. 2d 677; Williams v. State, Fla. App. 1966, 187 So. 2d 913; Richburg v. State, Fla. App. 1967, 199 So. 2d 488.

It is also urged that the trial court erred in failing to permit the evidence to be reopened after both parties had

rested, upon motion by the defendants Beauchamp and Sylvia. This is another discretionary ruling by the trial judge [Ferrell v. State, 45 Fla. 26, 34 So. 220; Wilson v. Johnson, 51 Fla. 370, 41 So. 395; Pitts v. State, Fla. 1966, 185 So. 2d 164], and it is incumbent upon the appellant to demonstrate an abuse of this discretion before this court would be warranted in reversing the convictions on this point. State v. Sears, 148 Fla. 89, 3 So. 2d 721; Gilchrist v. State, Fla. App. 1965, 177 So. 2d 777; Hanson v. State, Fla. App. 1966, 187 So. 2d 54. It is apparent that the trial court exercised due diligence in determining what the additional evidence would disclose, and determined that it was something that could have been discovered prior to trial. Therefore, we find no error in his refusal to reopen the case. Harvey v. State, Fla. 1956, 87 So. 2d 582; Roberts v. State, Fla. App. 1967, 195 So. 2d 257.

The appellant, Beauchamp, also urges that the trial court erred during the course of the trial, when it refused to require the chief prosecution witness to produce written reports which he had made. These were in the nature of private communications and we do not find it error for the trial judge not to require their production when they were not being used by the witness to refresh his recollection. Whitaker v. Blackburn, Fla. 1954, 74 So. 2d 794; Bedami v. State, Fla. App. 1959, 112 So. 2d 284; Jackman v. State, Fla. App. 1962, 140 So. 2d 627; State v. McCall, Fla. App. 1966, 186 So. 2d 324; Goldman v. United States, 316 U.S. 129, 62 S.Ct. 993, 86 L. Ed. 1322; Lambert v. United States, 5th Cir. 1958, 261 F. 2d 799.

Therefore, examining the errors raised by the appellants, we find no reason to upset the guilty verdict returned against each. However, the judgment rendered as to the Appellant, Sylvia, differs from the verdict on the charge. The charge in the information was "* * * that Frank Hiram Beauchamp and Gary James Sylvia on the 12th day of March, 1967, in the County and State aforesaid, did un-

lawfully and feloniously break and enter a dwelling house located at 480 Northeast 180th Drive, City of North Miami Beach, Dade County, Florida, property of Harold and Elaine Schiff, with intent to commit a felony therein, to-wit: Robbery, * * *". The verdict was "Guilty", and the judgment reads "It appearing unto this Court that you, Gary James Sylvia, have been regularly tried and convicted of Unlawfully and feloniously breaking and entering a dwelling house located in Dade County, Florida, with the intent to commit a felony, to-wit: Grand Larceny * * *." It is apparent that the judgment as to Sylvia is erroneous.

The verdict as to the appellant, Gary James Sylvia, in case No. 67-430, be and the same is hereby affirmed, but the judgment of conviction and sentence be and the same are hereby reversed and set aside and the case as to the appellant, Sylvia, is returned to the trial court for the entry of an appropriate judgment on the verdict and sentence accordingly under the statutes of this State.

The verdict, judgment of conviction and sentence as to the appellant, Frank Hiram Beauchamp, in case No. 67-531, be and the same is hereby affirmed.

Affirmed in part; reversed in part with directions.

APPENDIX I

IN THE DISTRICT COURT OF APPEAL THIRD DISTRICT OF FLORIDA

Case Nos. 67-430 and 67-531

GARY JAMES SYLVIA, *Appellant,*

v.

THE STATE OF FLORIDA, *Appellee.*

FRANK HIRAM BEAUCHAMP, *Appellant,*

v.

THE STATE OF FLORIDA, *Appellee.*

Petition for Rehearing

COME NOW APPELLANTS, GARY JAMES SYLVIA and FRANK HIRAM BEAUCHAMP, by their undersigned attorneys and file this Petition for Re-hearing directed to the Opinion of May 7, 1968.

As grounds for such Petition Appellants say:

1. The Opinion of the District Court of Appeal, Third District states that the trial court exercised due diligence in determining what the additional evidence would disclose and that it was something that could have been discovered prior to trial.

The Court overlooked and failed to consider that no factual predicate exists for such conclusions. On the contrary, the Court overlooked and failed to consider the fact that the newly discovered evidence was proffered through the attorney for the victim. It obviously could not have been discovered prior to the time of its presentation to the Court

but was brought forward at the earliest possible moment. Even based upon the Opinion of May 7 itself, and the cases cited therein, the evidence should have been permitted to be presented in proper fashion to the jury.

2. The Court overlooked and failed to consider the fact that the denial of severance deprived Appellants of their constitutional right to a fair trial. Presentation of the defense of entrapment was forced upon Appellant, Gary Sylvia, over his objection in that he sought to have the case presented to the jury prior to any testimony for the defense. He was, therefore, pushed into a position where the trial of the case on the theory propounded by counsel of his choosing was not permitted. The theory of counsel for Appellant, Frank Beauchamp, was forced upon Sylvia by the presentation of evidence for "the defendants", notwithstanding his constitutional right not to present a defense.

3. The Court failed to consider the fact that the hypothesis of innocence was not disproved by the testimony and, therefore, the verdict of guilty should not have been allowed. Appellant, Gary Sylvia, did not know of the gun. The participant Deitch did not know of the gun. See *Williams* v. *State,* Fla. 206 So. 2d 446, and cases cited therein. That principle applies to the case at bar in a circumstantial evidence situation such as that presented where Gary Sylvia was in precisely the same position as the appellant in Williams, supra.

4. Totally antagonistic defenses were presented in the trial court. Realism in considering trial practice in criminal cases impels the conclusion that a fair trial was not afforded either Appellant where vital differences of approach on both legal and factual defenses were presented by respective counsel.

5. The Court overlooked and failed to consider the fact that the trial judge no longer has jurisdiction to enter an entirely different judgment for Sylvia.

Respectfully submitted,

MILTON E. GRUSMARK and
NATALIE BASKIN
Attorneys for Appellant Sylvia

By: MILTON E. GRUSMARK
Milton E. Grusmark

ENGEL AND POLLACK
Attorneys for Appellant
Beauchamp

By: MAX ENGEL
Max Engel

I HEREBY CERTIFY that a true copy of the foregoing Petition for Re-hearing was mailed to Arden Siegendorf, Esq., Assistant Attorney General, Attorney for Appellee, 1350 N. W. 12th Avenue, Miami, Florida, this 21st day of May, 1968.

MILTON E. GRUSMARK and
NATALIE BASKIN
Attorneys for Appellant Sylvia

By: MILTON E. GRUSMARK
Milton E. Grusmark

ENGEL AND POLLACK
Attorneys for Appellant
Beauchamp

By: MAX ENGEL
Max Engel

APPENDIX J

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

January Term, A.D. 1968

Wednesday, May 29, 1968

Case No. 67-430

GARY JAMES SYLVIA, *Appellant,*

v.

THE STATE OF FLORIDA, *Appellee.*

Case No. 67-531

FRANK HIRAM BEAUCHAMP, *Appellant,*

v.

THE STATE OF FLORIDA, *Appellee.*

Counsel for appellants having filed in this cause petition for rehearing, and same having been considered by the court which determined the cause, it is ordered that said petition be and it is hereby denied.

A True Copy

ATTEST:

WILLIAM L. CARTER
Clerk, District Court of Appeal,
Third District

cc: Milton E. Grusmark
Natalie Baskin
Engel & Pollack
Arden M. Siegendorf
J. F. McCracken

(The Mandates in the above styled cause have today been issued and mailed to the Clerk of the Criminal Court of Record of Dade County, Florida).

APPENDIX K

SUPREME COURT OF THE UNITED STATES

No. ————, October Term 1968

GARY JAMES SYLVIA, *Petitioner,*

v.

FLORIDA

Order Extending Time To File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including Sept. 26th, 1968.

/S/ HUGO L. BLACK
Associate Justice of the Supreme Court of the United States

Dated this 4th day of Sept., 1968.

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IN THE

SUPREME COURT OF THE UNITED STATES

Office-Supreme Court, U.S.
FILED
NOV 12 1968
JOHN F. DAVIS, CLERK

OCTOBER TERM, 1968

No. 571

GARY JAMES SYLVIA,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

Petition for Writ of Certiorari to the District Court of Appeal, Third District of Florida

BRIEF FOR THE RESPONDENT

EARL FAIRCLOTH
Attorney General
State of Florida

MELVIN B. GROSSMAN
Assistant Attorney General
State of Florida
Counsel for Respondent
State Office Building (530)
1350 N. W. 12th Avenue
Miami, Florida 33136

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. _____

GARY JAMES SYLVIA,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

Petition for Writ of Certiorari to the District Court of Appeal, Third District of Florida

BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

An information for breaking and entering a dwelling was filed against Frank Hiram Beauchamp and the petitioner, Gary James Sylvia, in the Criminal Court of Record of Dade County, Florida (R. 534-536). The petitioner was charged in the information as a principal in the first degree for aiding, abetting and otherwise pro-

curing the co-defendant Beauchamp to escape from the scene of said crime, to escape detection, arrest and punishment in violation of Section 810.01, and Section 776.011, Florida Statutes.

The petitioner entered a plea of not guilty (R. 537); filed a motion for severance (R. 541-542), which was denied (R. 546); filed a motion to suppress, which was denied (R. 14) and a motion to quash (R. 538-539) which was denied (R. 547). The petitioner's motion for bill of particulars (R. 539-541) was granted in part and denied in part (R. 546).

Trial by jury was had on May 4, 1967. At the trial, the following evidence was introduced:

One Julius Deitch, an informer, testified that he met defendant Sylvia at the apartment of one Doreen Greer on March 8, 1967 (R. 237). After leaving the apartment, Julius Deitch, the petitioner, Sylvia, and Beauchamp, the co-defendant, went to the latter's apartment (R. 240). Conversation was had among the three men concerning the contemplated robbery (R. 240). No further conversation was had until approximately 6:00 p.m., on the night of the robbery. At that time the same three men, Deitch, Sylvia and Beauchamp drove past the intended residence (R. 242). Sylvia was present during conversation between Beauchamp and Deitch concerning what they would do (R. 242). Sylvia was present at a discussion in Beauchamp's apartment when Beauchamp laid out the structure of the Schiff house with toothpicks (R. 245). The petitioner asked Deitch if a piece (a gun) were needed (R. 283). The three men thereafter went to a restaurant where they were observed by two police officers (R. 118). The three men were together in the

parking lot for ten or fifteen minutes before leaving in Deitch's vehicle (R. 120). The two officers followed the three men and parked on the opposite side of the street about 60 yards away in an unmarked car. Beauchamp and Deitch left the car. The petitioner remained in Deitch's car in the driver's seat, behind the wheel (R. 299). The police, having been forewarned, were present in the house and apprehended the co-defendant (R. 132, 253). Meanwhile, the petitioner who had been waiting outside behind the steering wheel of the car, was arrested (R. 299, 300).

The jury rendered a verdict finding the petitioner guilty (R. 563). The petitioner was sentenced to imprisonment by confinement at hard labor in the State penitentiary for eight years (R. 564). An appeal was unsuccessfully taken to the District Court of Appeal, Third District of Florida. The opinion of the latter court is reported at 210 So.2d 286 (3rd D.C.A., Fla. 1968).

QUESTION PRESENTED

The Respondent respectfully rephrases the question presented by the Petitioner as follows:

> WHETHER THIS COURT'S HOLDING IN BRUTON v. UNITED STATES, — U.S. —, 20 L.ED. 2D. 476, 88 S.CT. 1620 (1968) REQUIRES A SEVERANCE WHERE ONE OF TWO DEFENDANTS, AT A JOINT TRIAL, RELIES UPON THE DEFENSE OF ENTRAPMENT?

REASONS FOR NOT GRANTING WRIT

THIS COURT'S HOLDING IN BRUTON v. UNITED STATES, — U.S. —, 20 L.ED.2D 476, 88 S.CT. 1620 (1968) DOES NOT REQUIRE A SEVERANCE WHERE ONE OF TWO DEFENDANTS, AT A JOINT TRIAL, RELIES UPON THE DEFENSE OF ENTRAPMENT.

The law in the State of Florida is clearly that the matter of severance is discretionary with the trial judge. See e.g. **Suarez v. State**, 95 Fla. 42, 115 So. 519 (1928). However, the Supreme Court of Florida has also held that where defenses or interests of joint defendants are antagonistic, or where evidence which is incompetent as to a defendant and prejudicial to him is introduced against a co-defendant, "it constitutes reversible error, unless the record shows that no injury resulted therefrom to the movant." **Palmer v. State**, 106 Fla. 237, 145 So. 69 (1932). In the instant case, the Florida Third District Court of Appeal, finding sufficient, competent evidence to support the conviction, held:

> "We fail to find an abuse of discretion on this record, although it might be better policy [when two defendants are charged and it is apparent, prior to trial, that one will put on no evidence and the other will rely on the defense of entrapment] that they not be tried together."

It would appear that the same view obtains in the Federal courts. **Opper v. United States**, 348 U.S. 84, 99 L.Ed. 101, 75 S.Ct. 158 (1954). Furthermore, it is clear

that the desire of the defendant to call a co-defendant as a witness is not in and of itself sufficient grounds for reversal. **United States v. Frazier**, 394 F.2d 258 (4th Cir., 1968); **Smith v. United States**, 385 F.2d 34 (5th Cir., 1967). The fact that a co-defendant's defense does nothing to exculpate an accused is likewise not error per se. **Brown v. United States**, 375 F.2d 310 (D.C. Cir., 1967). In the latter case, the Court of Appeals, District of Columbia Circuit, held that the fact that a co-defendant relied upon a defense of insanity did not by itself constitute sufficient grounds for reversal for failure to sever.

In the instant cause, the petitioner seeks issuance of a writ of certiorari on the basis that his right to confrontation under the Sixth Amendment of the United States Constitution as applied by this Court in **Bruton v. United States**, supra, was violated. The respondent respectfully contends that the holding of this Court in **Bruton** does not support his contention. The respondent further contends that the only thing that **Bruton** has in common with the instant case is that in both cases a severance was sought.

In **Bruton**, virtually the only evidence supporting the defendant's conviction was the confession of his co-defendant which directly implicated him. This Court, in the prior case, stated that these were powerfully incriminatory statements, inevitably suspect, and because no severance had been granted, unable to be tested by cross-examination. The introduction of the confession, this Court found, "posed a substantial threat" to the defendant's right to confront witnesses against him.

In the instant case there was no confession. It is true that hearsay statements made by petitioner's co-defendant out of the petitioner's presence were introduced. These were, however, admissible under the rule etablished by this Court. **Krulewitch v. United States,** 336 U.S. 440, 93 L. Ed. 790, 69 S. Ct. 716 (1949); **Spars v. United States,** 156 U.S. 51, 39 L. Ed. 343, 15 S. Ct. 273 (1895). Moreover, this was not the sole link between the charged offense and the petitioner. The record of the trial court proceedings contains testimony by an informer that the petitioner was present at the time the offense was contemplated and planned; that the petitioner drove the automobile, with the co-defendant and the informer, to the location previously decided on; and that the petitioner waited in that automobile for the successful return of the co-defendant and the informer.

The fact that testimony as to conversations outside the petitioner's presence were introduced does not bring this case within the rule established by this Court in **Bruton.** Whether or not a severance had been granted, the petitioner, in seeking to elicit testimony from his co-defendant, would nonetheless have been confronted with the latter's right to remain silent; and his desire in this regard does not constitute sufficient grounds for severance. **United States v. Frazier,** supra; **Smith v. United States,** supra. Nor can it be said here that the inability of petitioner's trial counsel to prosecute a silent co-defendant in argument to the jury, "posed a threat to petitioner's right to confront the witnesses against him." **Bruton v. United States,** supra.

It is clear from the holdings of this Court that the Sixth Amendment right of confrontation of witnesses against a defendant is binding upon State court proceedings. **Pointer v. Texas**, 380 U.S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065 (1965). However, it is also clear that this right is primarily one of cross-examination and that, in effect, it adopts the hearsay rule with all of that rule's many exceptions. **Pointer v. Texas**, supra; **Douglas v. Alabama**, 380 U.S. 415, 13 L. Ed. 2d 934, 85 S. Ct. 1074 (1965); 5 Wigmore, Evidence, 3rd. ed. 127, Section 1396. Nor is it disputed by the petitioner that extra-judicial statements of a co-conspirator in the furtherance of the planned offense are admissible. **Krulewitch v. United States**, supra. This is especially true when the statements are made in the presence of the defendant. **Spars v. United States**, supra; **People v. Norman**, 60 Cal. Rptr. 609 (1st D.C.A., Cal. 1967).

The test established by this Court in **Bruton v. United States**, supra, is that a severance should be granted if a joint trial poses a substantial threat to an accused's right of confrontation. The respondent respectfully submits that such cannot be said to have occurred here.

CONCLUSION

It is respectfully submitted that the decision of the District Court of Appeal, Third District of Florida, is not in conflict with applicable Federal law or any decision of this Court. Therefore, there has been no showing by the petitioner of any abridgement of his constitutional rights. For these reasons, it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

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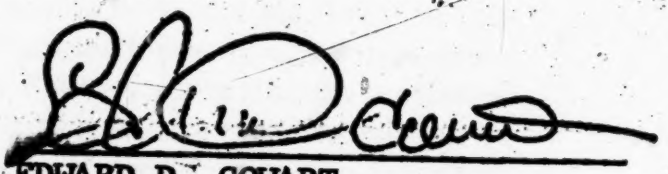

EDWARD D. COWART
Assistant Attorney General
State of Florida

IN THE SUPREME COURT OF THE UNITED STATES
CASE NO. _____
GARY JAMES SYLVIA,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

STATE OF FLORIDA :
: SS
COUNTY OF DADE :

AFFIDAVIT OF SERVICE

I, MELVIN B. GROSSMAN, Assistant Attorney General, State of Florida, first being duly sworn according to law, do depose and say:

I HEREBY CERTIFY that three copies of Brief for the Respondent to the Supreme Court of the United States was served upon HONORABLE MILTON E. GRUSMARK, Attorney for Petitioner, 1674 Meridian Avenue, Suite 311, Miami Beach, Florida 33139, by mailing the copies of same to him by United States Mail, First Class postage prepaid, pursuant to Rule 33 of this Court, this 7th day of November, 1968.

MELVIN B. GROSSMAN
Assistant Attorney General

Sworn to and subscribed before me at Miami, Dade County, Florida, this 7th day of November, 1968.

Linda R. Emerick
NOTARY PUBLIC
State of Florida at Large
My Commission Expires:

NOTARY PUBLIC, STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES NOV. 4, 1971
BONDED THROUGH FRED W. DIESTELHORST

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 571

GARY JAMES SYLVIA, Petitioner

vs.

THE STATE OF FLORIDA, Respondent

REPLY BRIEF FOR THE PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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It is the position of Respondent that Bruton v. United States, ____U.S.____, 20 L.ed2d 476, is inapplicable because there is no actual confession in the case at bar and no denial of a right of confrontation required under the Sixth Amendment. The elements of Bruton are, however, present in this case.

b) The right of confrontation does in fact exist but only theoretically. From a practical point of view it is as absent here as it was in Bruton. In the case under consideration no trial attorney would conceivably cross-examine a co-defendant's witnesses seeking to establish the defense of entrapment. If he did the effect of confession inherent in entrapment would be present without the implicit denial of guilt. Entrapment as a defense includes confession and avoidance. The avoidance of confession would have been contradicted by the cross-examination. From a practical point of view, therefore, the witnesses could not and should not have been cross-examined.

In Bruton the Court not only decried the absence of the right of confrontation but also recognized the fallibility of the contention that jury instructions are a cure-all. That phas of Bruton, supra, is also present in the case at bar. Thus, it is respectfully submitted that Bruton does, in fact, apply.

More important, however, it would seem that this case includes the deprivation of procedural due process and a fair trial guaranteed by the Fourteenth Amendment and referred to in the dissenting opinion of Douglas v. Alabama, 380 U.S. 415, 13 L.ed2d 934, 85 S.Ct. 1074 and Pointer v. Texas, 380 U.S. 400, 13 L.ed2d 923, 85 S.Ct. 1065.

Counsel for Petitioner did not seek a severance without attempting to save the

situation and provided an alternative method of securing a fair trial under the circumstances. At the termination of the State's case he moved the court to submit the case to the jury to determine Petitioner's guilt or innocence prior to the submission of any testimony. Had that been done a fair trial would have been afforded Petitioner; no mistrial would have been necessary; no severance would have been required and the co-defendant also could have submitted his case in the manner he thought most appropriate to his contention and theory of the case. That was not done.

This record is perhaps different in some respects from those reflected by current reported opinions. It is respectfully urged that the violent disagreement between counsel as to procedure not personalities, warranted a severance of the cases. The record further discloses not only disagreement as to the presentation of evidence at the termination of the State's case but strong expressed conflict as to the use of particular witnesses proposed to be put on the stand as witnesses for the defendant. Permitting those witnesses to be heard by the jury as witnesses for the defense in effect created the supremacy in the trial of the case of the co-defendant's counsel as opposed to Petitioner's counsel. The right to counsel with the attendant reliance on counsel's presentation of his defense was certainly diluted by the procedure.

The deficiencies were recognized by the opinion of the District Court of Appeal, Third District of the State of Florida. That court conceded that severance might have been preferable. It would seem that if one is entitled to a fair trial one is entitled to as fair a trial as it is possible to attain. When the court recognized that severance might have been advisable or preferable under the circumstances it recognized that Petitioner had not been afforded as fair a trial as was easily possible under the circumstances in the trial court.

CONCLUSION

For the reasons submitted here as well as in Petitioner's original brief it is respectfully urged that the case merits full consideration by this Court and that the issuance of the writ is appropriate.

Respectfully submitted,

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I HEREBY CERTIFY that a true copy of the foregoing Reply Brief for the Petitioner in Support of Petition for Writ of Certiorari was mailed to Arden Siegendorf, Esq., Assistant Attorney General, Attorney for Respondent, 1350 N. W. 12th Avenue, Miami, Florida, this_____day of November, 1968.

_____

Milton E. Grusmark